No. 80-2078

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

DAMES & MOORE, a partnership, *Petitioner*,

v.

DONALD T. REGAN, THE SECRETARY OF THE TREASURY OF THE UNITED STATES OF AMERICA, and THE UNITED STATES OF AMERICA, *Respondents*.

MOTION FOR LEAVE TO FILE A BRIEF AMICUS CURIAE OF FORMER HOSTAGE JERRY PLOTKIN AND BRIEF

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MOTION FOR LEAVE TO FILE A BRIEF AMICUS CURIAE OF FORMER HOSTAGE JERRY PLOTKIN

Former Hostage Jerry Plotkin respectfully moves this Court for leave to file a brief "Amicus Curiae" in *Dames & Moore, a Partnership* v. *Donald T. Regan, the Secretary of the Treasury of the United States of America, and the United States of America,* No. 80-2078.

INTEREST OF THE AMICUS CURIAE

Jerry Plotkin is a private American citizen who was in Iran in late 1979 on business in connection with providing technical workers for Iranian construction

projects. In the morning of November 4, 1979, Mr. Plotkin was in the compound of the United States Embassy in Tehran, Iran when the Embassy was overrun and captured. Mr. Plotkin was among a group of American citizens held hostage for over fourteen months.

Mr. Plotkin's and other hostages' release was in part secured by the negotiation and execution of agreements commonly known as the "Algerian Declarations." At approximately the same time as the United States Government entered into the Algerian Declarations, President Jimmy Carter promulgated Executive Order 12283, dated January 19, 1981, entitled "Non-Prosecution of Claims of Hostages and for Actions at the United States Embassy and Elsewhere." Both the Algerian Declarations and Executive Order 12283 purport to preclude Jerry Plotkin and all other former hostages from using the courts to seek redress for any wrongs committed which arise out of the Iranian seizure of the American Embassy in Tehran.

UNPRESENTED FACTS AND LAW

Because of the vastly different factual contexts forming the bases for challenges to the constitutionality of Executive Order 12283 and the Algerian Declarations between the former hostages on the one hand, and American businesses with claims against Iran on the other, Jerry Plotkin asks the Court to recognize that its decision may significantly and unfairly affect his ability to pursue legal remedies for the ordeal he suffered while in captivity. Mr. Plotkin, and the other former hostages, have not had the opportunity to fully present the facts and legal contentions regarding the invalidity of the Algerian Declarations and Executive Order 12283. This lack of opportunity is especially

significant because the curtailment of rights suffered by the returned hostages is even more drastic than the significant due process restrictions imposed upon Petitioner Dames & Moore by the actions of President Carter and President Reagan in resolving the "hostage crisis." Because of such Presidential actions, Mr. Plotkin's access to the courts for matters involving his captivity in Iran is totally barred, while Petitioner's access is merely "suspended."

Because of the different factual setting of Petitioner Dames & Moore's claims, the factual and legal contentions of Jerry Plotkin and the other former hostages have not and cannot be presented to this Court by the Petitioner. Moreover, because of the lack of a detailed record regarding the factual and legal contentions of Jerry Plotkin and the other former hostages, a determination of their rights by the Court at this time would be premature.

CONCLUSION

For the foregoing reasons, the motion for leave to file a brief Amicus Curiae of former hostage Jerry Plotkin should be granted.

Dated: June 18, 1981.

Respectfully submitted,

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AMICUS CURIAE BRIEF OF FORMER HOSTAGE JERRY PLOTKIN

INTEREST OF THE AMICUS CURIAE

This Amicus Curiae Brief arises out of dramatic events of national and historic significance. Amicus Curiae Jerry Plotkin is a private American citizen who was in Iran in late 1979 on business in connection with providing technical workers for Iranian construction projects. Mr. Plotkin was within the compound of the United States' Embassy in Tehran, Iran, the morning of November 4, 1979 when that Embassy was overrun and captured. Mr. Plotkin was among a group of American citizens held hostage for over fourteen months in the compound of the Embassy and at other locations in Iran, and was a member of the group of

fifty-two hostages returned to the United States shortly after the expiration of the term of President Jimmy Carter.

The release of the fifty-two former hostages was in part secured by the negotiation and execution of certain agreements by Deputy Secretary of State Warren Christopher on behalf of the United States Government, which are collectively and commonly known as the "Algerian Declarations." The specific agreements pertinent to Mr. Plotkin for the purposes of this action are the Declaration of the Government of the Democratic and Popular Republic of Algeria (hereinafter "Algerian Declaration I") and the Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran (hereinafter "Algerian Declaration II").

At approximately the same time the United States Government entered into the Algerian Declarations, President Carter promulgated Executive Order 12283 entitled "Non-Prosecution of Claims of Hostages and For Actions at the United States Embassy and Elsewhere" (hereinafter "Executive Order 12283 re Claims of Hostages"). Both the Algerian Declarations and the Executive Order 12283 re Claims of Hostages purport to preclude Mr. Plotkin and all other former Iran hostages from seeking redress in a judicial forum for wrongs done to them while held captive in Iran.

SUMMARY OF ARGUMENT

Amicus Curiae Jerry Plotkin was one of fifty-two American hostages seized November 4, 1979 at the

American Embassy in Tehran, Iran. The right to seek redress of his claims against Iran are purportedly determined by the Algerian Declarations and Executive Order 12283.

Unlike Petitioner, Dames & Moore, the rights of Amicus Curiae Plotkin to prosecute his claim in a judicial forum against Iran in connection with his capture and detention have been totally eliminated. In contrast, certain classes of commercial claimants against Iran merely have their claims "suspended," and further have access to an alternative forum, the Iran-United States Claims Tribunal.

Mr. Plotkin respectfully urges the Court in determining the rights of the Petitioner to restrict its opinion to the precise facts presented and preserve the opportunity of Mr. Plotkin and other returned hostages to assert their claims at a further date—claims which spring from an unprecedented factual context totally distinct from that of Petitioner.

ARGUMENT

1. The Rights And Remedies Of The Former Hostages Under The Algerian Declarations And The Executive Orders Differ Substantially From Those Of Petitioner.

On or about June 10, 1981, petitioner Dames & Moore submitted to the United States Supreme Court a Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit before Judgment. Petitioner Dames & Moore seeks, in part, to determine whether the President of the United States has statutory or constitutional authority to settle or abrogate claims of American citizens against foreign states and their agencies. Petitioner Dames &

Moore further seeks to have the Supreme Court of the United States determine whether such an exercise of Presidential power, if valid, constitutes an unconstitutional taking of property under the Fifth Amendment to the Constitution of the United States.

Resolution of the above questions necessarily invites this Court to determine certain issues concerning the validity of the Algerian Declarations and various relevant Executive Orders. Amicus Curiae Jerry Plotkin supports the contentions of petitioner Dames & Moore that the Algerian Declarations and related Executive Orders constitute an invalid exercise of Presidential power and are therefore null and void. Mr. Plotkin will not burden the Court at this juncture with further citation of authority supporting the Petitioner's assertions. However, Mr. Plotkin respectfully requests this Court to recognize that the decision which it renders on the questions presented by Petitioner Dames & Moore may have significant impact on the ability of Mr. Plotkin, and other returned hostages who shared his ordeal, to pursue legal remedies to which they are entitled pursuant to the provisions, *inter alia,* of Article III of the United States Constitution and the Fifth Amendment to the United States Constitution.

Because of the circumstances of time and history, Mr. Plotkin, and all other returned hostages, have not yet had opportunity to fully present their legal contentions concerning the invalidity of the Algerian Declarations and Executive Order 12283 re Claims of Hostages as specifically applied to Mr. Plotkin and others with similar claims. The divestment of rights of the returned hostages under the Algerian Declarations and Executive Order 12283 re Claims of Hostages constitute an even more drastic curtailment of rights

of due process than the very significant violations imposed upon Petitioner as a result of the Presidential actions. Thus, Mr. Plotkin, respectfully directs the attention of this Court to certain significant distinctions between himself and Petitioner in the hope that any decision rendered by this Court in this case will not unduly restrict the unique and distinguishable rights of the returned hostages to pursue claims arising out of the seizure of the American Embassy in Tehran.

2. The Algerian Declarations And Executive Orders Precludes Judicial Redress For Claims Of Former Hostages.

Article II of the Algerian Declaration II states in pertinent part that "[a]n international arbitral tribunal (the Iran-United States Claims Tribunal) is hereby established for the purpose of deciding claims of nationals of the United States against Iran. . . ." However, Article II explicitly excepts from its provision all claims described in Paragraph 11 of the Algerian Declaration I. Paragraph 11 states, in pertinent part, that the United States shall "promptly withdraw all claims now pending against Iran before the International Court of Justice and will thereafter *bar* and *preclude* the prosecution against Iran of any pending or future claim of the United States or a United States national arising out of events, . . . related to (A) the seizure of the fifty-two United States nationals on November 4, 1979, (B) their subsequent detention; (C) injury to United States property or property of the United States Nationals within the United States Embassy compound in Tehran after November 3, 1979. . . ."

In short, Amicus Curiae Jerry Plotkin and other former hostages are purportedly *absolutely barred*

from commencing or pursuing any claim related to the seizure of hostages. Indeed, Executive Order 12283 re Claims of Hostages authorizes the Secretary of the Treasury to promulgate regulations providing for an even more severe prohibition against prosecution of claims by hostages, inasmuch as the Executive Order would prohibit any person subject to the jurisdiction of the United States from prosecuting "in any court within the United States *or elsewhere* any claim against the Government of Iran" arising out of the American Embassy seizure in Tehran. [Emphasis added]. Under Executive Order 12283 re Claims of Hostages, the Treasury Secretary is further empowered to order the "*termination* of any previously instituted judicial proceedings and may further *prohibit* enforcement of any judicial order issued in the course" of any proceedings concerning a claim based on the seizure of the United States Embassy in Iran. [Emphasis added].

In contrast, certain classes of commercial litigants against Iran enjoy the benefits of access to the Iran-United States Claims Tribunal under Article II of the Algerian Declaration II and, by virtue of Presidential Executive Order 12294, dated February 24, 1981, executed by President Ronald Reagan, suffer merely a "suspension" of their claims against Iran, rather than absolute termination. Executive Order 12294 provides further that those claimants entitled to present claims to the Iran-United States Claims Tribunal may commence an action in a court of competent jurisdiction in the United States "for the purpose of tolling the period of limitations for commencement of such action." Executive Order 12294 of February 24, 1981, Section 1. Furthermore, in the event

that the Iran-United States Claims Tribunal determines that it does not have jurisdiction over a given claim, the suspension provided in Executive Order 12294 is terminated and the claimant is entitled to revive its action in the judicial forum where the action was initially commenced. Executive Order 12294 of February 24, 1981, Section 3. Finally, if any such claimant is successful in obtaining judgment in the Iran-United States Claims Tribunal, but unsuccessful in collecting payment of the full amount awarded by such Tribunal, the claim is not discharged and may be pursued in the appropriate judicial forum in the United States or elsewhere. Executive Order 12294 of February 24, 1981, Section 4.

Article I of the Algerian Declaration II provides in pertinent part that "Iran and the United States will promote the settlement of the claims described in Article II by the parties directly concerned. Any such claims not settled within six months from the date of entry into force of this agreement shall be submitted to binding third party arbitration. . . ." In contrast, no such opportunity for settlement or arbitration is provided to Amicus Curiae Jerry Plotkin or any of the other former hostages similarly situated.

In sum, the severely restricted right of Mr. Plotkin to pursue legal redress stands in marked contrast to rights granted to certain classes of commercial claimants under the Algerian Declarations and Executive Orders. The significance of such vital distinctions has not been lost on the Circuit Courts of Appeal which have considered the issue of the President's power to enter into the Algerian Declarations. For example, in sustaining the President's inherent power to enter into such agreements with sovereign nations, the Court

of Appeals for the District of Columbia stated in *American International Group, Inc.* v. *Islamic Republic of Iran,* No. 80-1779 (June 5, 1981):

> "Our inquiry, then, is whether the President has the power to suspend the claims of Americans against foreign sovereigns through an executive agreement modifying substantive law and entered into without the advice and consent of the Senate or other Congressional endorsements. Bearing on this decision are two particulars of the Presidential action with respect to the claims against Iran: (1) the Executive asks only their *suspension,* not their cancellation; and (2) the Executive has provided an *alternative forum capable of providing meaningful relief.*" (Typewritten opinion at Page 27). [Emphasis added].

No such forum has been afforded to Mr. Plotkin.[1]

3. The Issue Of The Former Hostages' Rights Is Not Before The Court

Amicus Curiae Jerry Plotkin emphasizes that the benefits of due process and access to a judicial for m of choice should be open to all claimants against the Government of Iran, whether they be Petitioner herein, other commercial claimants or other returned hostages. Thus, in accordance with the arguments by Petitioners herein, the Algerian Declarations and pertinent Executive Orders should be invalidated by this Court.

---

[1] Amicus Curiae Plotkin is mindful of the Hostage Compensation Commission established by Executive Order 12285 of January 19, 1981. However, that Commission is merely empowered to "study and analyze" and to "make recommendations" regarding legislative enactment of financial compensation to categories of United States nationals held hostage. The Commission is neither obligated nor empowered to ensure due process rights to the former hostages.

However, in the event that this Court decides adversely to Petitioner on any issue or portions of issues presented herein, Mr. Plotkin asks only that his particular and distinct rights against the Government of Iran not be consumed by the language of any possible adverse decision on the specific claims presented by Petitioner.

Long followed practice mandates that this Court not reach the question of the constitutionality of the Algerian Declarations or of Executive Order 12283 re Claims of Hostages as they affect Amicus Curiae Jerry Plotkin and other returned hostages. This Court does not "decide abstract, hypothetical or contingent questions" or "decide any constitutional question in advance of the necessity for its decision" or "formulate a rule of constitutional law broader than is required by the precise facts to which it is applied," or "decide any constitutional question except with reference to the particular facts to which it is to be applied." *Alabama State Federation of Labor* v. *McAvon*, 325 U.S. 450, 461 (1945). *See, also, Allen Bradley Local No. 1111, et al.* v. *Wisconsin Employment Relations Board*, 315 U.S. 740, 824 (1942); *Tennessee Pub. Co.* v. *American National Bank, et al.*, 299 U.S. 18 (1936). Thus, because the issues presented by this case involve only the rights of commercial litigants, the Court's opinion should not seek to determine the former hostages' rights.

CONCLUSION

For all of the foregoing reasons it is respectfully requested by Amicus Curiae Jerry Plotkin that this Court take cognizance of the above-described distinctions between Amicus Curiae and Petitioner in rendering its decision in the within action.

Dated: June 18, 1981.

Respectfully submitted,

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